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# Public Prosecutor v Ng Wing Fau & Ors

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–131–03 OF 2017
ZAWAWI SALLEH, ZAKARIA SAM AND ABDUL KARIM JJCA
26 FEBRUARY 2018

C *Criminal Procedure — Trial — Criminal application — Respondents charged with offences under ss 135(i)(g) and 138 of the Customs Act 1967 — Magistrate acquitted and discharged respondents — Appellants filed appeals — Hearing of appeals postponed because respondents were absent — Appellants appeals struck off due to the absence of respondents — Appellants applied to relist appeals — High* D *Court dismissed criminal application — Whether there were proper and competent appeals before court — Whether High Court functus officio when appeals were struck off — Criminal Procedure Code s 278*

E The first and fifth respondents were charged at the magistrate's court for an offence under s 135(1)(g) of the Customs Act 1967 ('the Act') and a second alternative charge under s 138 of the Act, both punishable under s 135(1)(iii)(aa) of the same Act. At the end of the trial, the magistrate found that the respondents had succeeded in raising a reasonable doubt in the F prosecution's case, as such, he acquitted and discharged the respondents. Aggrieved by the decision, the appellant filed two appeals ie Appeal No 41LB-03–02 of 2015 ('appeal 1') and Appeal No 41(ORS)-01–02 of 2015 ('appeal 2'). The hearing of the appeals was postponed several times because the respondents were absent. Due to their absence, the learned High Court judge G ordered both the appeals to be struck off on 8 September 2016. Subsequently, the appellant had filed a notice of motion for the following reliefs: (a) to relist appeal 1 and appeal 2 which were struck off earlier; (b) to grant extension of time to the appellant to file an appeal against the decision dated 8 September 2016 to the Court of Appeal; and (c) to stay the execution of the magistrate's H decision ordering the return of the seized good to the respondent. On 19 February 2017, the learned judge had dismissed the notice of motion, hence the present appeal. The respondents raised a preliminary objection that there was no proper and competent appeal before the court because the appeal had failed to fulfill the requirements of s 51(2) of the Courts of Judicature Act 1964. I The appellant submitted that when the appeals were struck off, the actual issues of the appeal proper were not yet decided upon, as such, the High Court was not functus officio as the decision dated 8 September 2016 was not a judgment.

**Held**:

(1) The order of the High Court dismissing the appellant's application to relist appeal 1 and appeal 2 which were struck out earlier by another judge was not an interlocutory decision. It ought to be noted that this was at the appellate stage after the learned magistrate had acquitted and discharged the respondents. The very nature of the dismissal of the notice of motion possessed element of finality. Upon dismissing the notice of motion, the appellant's appeal would become infructuous and the order of acquittal and discharge made by the learned magistrate must therefore be regarded as final. Therefore, the decision dated 19 February 2017 was appealable to the Court of Appeal. Further, the notice of appeal dated 24 February 2017 had formulated the question of law in respect of which the present appeal was made. Based on the above reasons, the court dismissed the preliminary objection (see paras 12–14).

(2) By using the proper approach of analogy from the decided cases from other jurisdictions, the expression 'judgment' must necessarily mean a considered order on merits and not an order of dismissal for default. Therefore, functus officio under s 278 of the Criminal Procedure Code did not arise as the appeals were struck off merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court was competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to law (see para 19).

(3) For the above reasons, the court allowed the appellant's appeal and set aside the order dated 19 February 2017 and relisted appeal 1 and appeal 2. The appeals were to be remitted back to the High Court and be heard on its merits before another High Court judge. Pending disposal of the appeals, a stay of execution against the order of the magistrate's court to return the exhibits to the respondent was also granted (see para 21).

**[Bahasa Malaysia summary**

Responden-responden pertama dan kelima telah dituduh di mahkamah majistret kerana kesalahan di bawah s 135(1)(g) Akta Kastam 1967 ('Akta tersebut') dan pertuduhan alternatif kedua di bawah s 138 Akta tersebut, kedua-dua yang boleh dihukum di bawah s 135(1)(iii)(aa) Akta yang sama. Di akhir perbicaraan, majistret mendapati bahawa responden telah berjaya menimbulkan keraguan munasabah dalam kes pendakwaan, oleh itu, beliau telah melepas dan membebaskan responden-responden. Terkilan dengan keputusan itu, perayu telah memfailkan dua rayuan iaitu Rayuan No 41LB-03–02 Tahun 2015 ('rayuan 1') dan Rayuan No 41(ORS)-01–02 Tahun 2015 ('rayuan 2'). Perbicaraan rayuan-rayuan itu telah ditangguh beberapa kali kerana responden-responden tidak hadir. Akibat ketidakhadiran mereka, hakim Mahkamah Tinggi yang bjaksana memerintahkan rayuan-rayuan itu dibatalkan pada 8 September 2016. Berikutan itu, perayu telah memfailkan notis usul untuk relif-relif berikut: (a) untuk menyenaraikan

A semula rayuan 1 dan rayuan 2 yang telah dibatalkan terdahulu; (b) untuk memberikan lanjutan masa kepada perayu memfailkan rayuan terhadap keputusan bertarikh 8 September 2016 kepada Mahkamah Rayuan; dan (c) untuk menggantung pelaksanaan keputusan majistret yang memerintahkan pemulangan barangan yang disita kepada responden. Pada 19
B Februari 2017, hakim yang bijaksana telah menolak notis usul itu, justeru rayuan ini. Responden-responden telah menimbulkan bantahan awal bahawa tiada rayuan yang sewajarnya dan kompeten di hadapan mahkamah kerana rayuan itu telah gagal memenuhi keperluan s 51(2) Akta Mahkamah Kehakiman 1964. Perayu berhujah bahawa apabila rayuan-rayuan itu
C dibatalkan, isu-su sebenar rayuan yang sewajarnya masih tidak diputuskan lagi, oleh itu, Mahkamah Tinggi tidak *functus officio* kerana keputusa bertarikh 8 September 2016 bukan suatu penghakiman.

D **Diputuskan**:

(1) Perintah Mahkamah Tinggi menolak permohonan perayu untuk menyenaraikan semula rayuan 1 dan rayuan 2 yang telah dibatalkan terdahulu oleh hakim lain bukan suatu keputusan interlokutori. Ia patut ditekankan bahawa ini adalah di peringkat rayuan selepas majistret
E melepas dan membebaskan responden-responden. Sifat sebenar penolakan notis usul itu mempunyai elemen muktamad. Selepas menolak notis usul itu, rayuan perayu menjadi tidak berfungsi dan perintah pelepasan dan pembebasan yang dibuat oleh majistret yang bijaksana mestilah dengan itu dianggap sebagai muktamad. Oleh itu,
F keputusan bertarikh 19 Februari 2017 boleh dirayu kepada Mahkamah Rayuan. Selanjutnya, notis rayuan bertarikh 24 Februari 2017 telah membentuk persoalan undang-undang berkaitan rayuan ini dibuat. Berdasarkan sebab-sebab di atas, mahkamah menolak bantahan awal itu (lihat perenggan 12–14).

G (2) Dengan menggunakan pendekatan yang sesuai berhubung analogi daripada kes-kes yang telah diputuskan daripada bidang kuasa lain, istilah 'penghakiman' semestinya bermaksud perintah yang dipertimbangkan atas merit dan bukan perintah penolakan kerana
H kegagalan. Oleh itu, functus officio di bawah s 278 Kanun Tatacara Jenayah tidak timbul kerana rayuan-rayuan itu telah dibatalkan hanya oleh sebab ketidakhadiran responden pertama tanpa pertimbangan keseluruhan keterangan. Mahkamah Tinggi adalah kompeten untuk mengetepikan perintah sedemikian dengan menggunakan bidang kuasa
I sedia adanya; dan selepas itu menyenaraikan semula rayuan-rayuan itu dan untuk mendengar dan memutuskan rayuan-rayuan itu menurut undang-undang (lihat perenggan 19).

(3) Berdasarkan sebab-sebab di atas, mahkamah telah membenarkan rayuan perayu dan mengetepian perintah bertarikh 19 Februari 2017 dan

menyenaraikan semula rayuan 1 dan rayuan 2. Rayuan-rayuan itu hendaklah dirujuk semula kepada Mahkamah Tinggi dan didengar atas merit di hadapan hakim Mahkamah Tinggi yang lain. Sementara menunggu rayuan-rayuan itu selesai, satu penggantungan pelaksanaan terhadap perintah mahkamah majistert untuk memulangkan ekshibit-ekshibit kepada responden juga diberikan (lihat perenggan 21).]

**Notes**

For cases on trial in general, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5655–6314.

**Cases referred to**

*Ayubbhai Abdulbhai Shah vs Gabha Bechar And Ors* (1994) 1 GLR 441, HC (refd)
*Chhotey Lal v Tinke Lal And Anr* [1935] AIR 815, HC (refd)
*Dato' Seri Anwar bin Ibrahim v PP* [1999] 1 MLJ 321, CA (refd)
*Gibbons vs Unknown, In Re: FW* (1887) ILR 14 Cal 42, HC (distd)
*Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 (refd)
*Md Alwin Mustapa & Ors v PP* [1999] 5 CLJ 417, HC (refd)
*Ooi Sim v PP* [1990] 1 MLJ 88, SC (distd)
*Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272; [2009] 3 CLJ 388, HC (refd)
*PP v Heng You Nang* [1949] 1 MLJ 285 (distd)
*PP v Arab Malaysian Finance Bhd* [2003] 4 MLJ 304; [2003] 4 CLJ 243, HC (refd)
*Saad bin Abas & Anor v PP* [1999] 1 MLJ 129, CA (refd)
*Uthayakumar a/l Ponnusamy v YAB Dato' Sri Najib bin Tun Razak Perdana Menteri Malaysia & Ors* [2017] 1 MLJ 235, CA (refd)

**Legislation referred to**

Courts of Judicature Act 1964 ss 3, 22, 50, 50(2), 51(2), 56
Criminal Procedure Code s 278
Customs Act 1967 s 135(1)(g), 135(1)(iii)(aa), 138

**Appeal from:** Criminal Application No 44–44–12 of 2016 (High Court, Johor Bahru)

*Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*
*JR Ravendren (JR Ravendren & Assoc) for the respondents.*

**Zawawi Salleh JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This appeal emanates from the decision of the High Court at Johor Bahru dated 19 February 2017, dismissing the public prosecutor's ('PP') criminal application filed vide a notice of motion dated 15 December 2016. In the said notice of motion, the PP applied to the High Court for the following reliefs:

(a) to relist the Appeal Nos 41LB-03–02 of 2015 and 41(ORS)-01–02 of 2015 which were struck off earlier by His Lordship Justice Dato' Mohd Sofian bin Tan Sri Abd Razak on 8 September 2016;

(b) to grant an extension of time to the PP to file an appeal against the decision dated 8 September 2016 to the Court of Appeal; and

(c) to stay the execution of the magistrate's decision dated 28 January 2016 ordering the return of the seized good to the respondent (fifth respondent).

**[2]** Being disenchanted by the said order, the PP has now appealed to this court. Hence, this appeal before us.

BRIEF BACKGROUND

**[3]** In order to appreciate the short issue involved in this instant appeal, it is necessary to set out the following salient facts:

(a) the first and fifth respondents were charged separately before the Magistrate's Court at Johor Bahru for an offence under s 135(i)(g) of the Customs Act 1967 and a second alternative charge under s 138 of same Act, both punishable under s 135(1)(iii)(aa) of the same Act. The first and fifth respondents claimed trial to the charges;

(b) upon the application of the PP, a joint trial was held where the first respondent at all material times represented the fifth respondent's company;

(c) on 3 September 2013, the respondents were acquitted and discharged by the magistrate's court at the close of the prosecution's case without their defence being called on the ground that the prosecution had failed to make out a prima facie case against them;

(d) the PP appealed to the High Court. The High Court thereafter ordered the respondents to enter their defence and remitted the case back to the magistrate's court for continued hearing. On 28 January 2015, at the conclusion of the trial, the learned magistrate held that the respondents

had succeeded in raising a reasonable doubt in the prosecution's case. In the result, he acquitted and discharged the respondents; A

(e) the PP, being aggrieved by the decision of the learned magistrate in acquitting and discharging the respondents had once again appealed to the High Court ie Appeal Nos 41LB-03–02 of 2015 and 41(ORS)-01–02 of 2015. The appeals were initially set for hearing on 18 April 2016 but were further postponed to 31 May 2016, 23 June 2016 and 8 September 2016 as the respondents were absent. The prosecution had made several unsuccessful attempts to trace the respondents. Due to their absence, the learned High Court judge ordered both the appeals to be struck off; B C

(f) on 15 December 2016, the PP filed a notice of motion for reinstatement of the appeals accompanied with an affidavit in support. The PP had also sought for an extension of time to file an appeal against the High Court decision dated 8 September 2016 to the Court of Appeal and for a stay of execution of the decision of the learned magistrate dated 28 January 2015 in ordering the seized exhibits to be returned to the first and fifth respondents. It is also noteworthy to mention that the said notice of motion had now included the second, third and fourth respondents although they were not charged before the magistrate's court; D E

(g) on 19 February 2017, the learned High Court judge had dismissed the notice of motion; and

(h) being aggrieved with the said decision, the PP appealed to this court. Hence, this instant appeal before us. F

THE ISSUE BEFORE THE HIGH COURT

**[4]** There are four issues for determination by the High Court, namely: G

(a) whether the appeals previously struck off by the High Court on 8 September 2016 can be relisted for hearing;

(b) whether the High Court can allow the extension of time to file an appeal to the Court of the Appeal against the decision of the High Court on 8 September 2016; H

(c) whether the second, third and fourth respondents ought to be included in the application; and

(d) whether a stay of execution against the order of the magistrate's court to return the exhibits to the respondents should be allowed. I

**[5]** In dismissing the PP's application, the learned High Court judge reasoned, inter alia, as follows:

(a) a court of concurrent jurisdiction could not review an order made earlier by another court. The PP ought to have filed an appeal against the decision or order of Justice Dato' Mohd Sofian bin Tan Sri Abd Razak dated 8 September 2016 to the Court of Appeal;

(b) the High Court has no jurisdiction to allow any extension of time as sought by the PP because such application ought to have been made to the Court of Appeal pursuant to s 56 of the Courts of Judicature Act 1964 ('the CJA 1964');

(c) there was no special circumstances stated in the notice of motion warranting for a stay of execution in respect of the seized goods; and

(d) the inclusion of the second, third and fourth respondents was plainly misconceived.

PRELIMINARY OBJECTION

**[6]** At the outset of the hearing of the appeal before us, learned counsel for the respondents raised a preliminary objection stating that the present appeal could not be entertained on the ground that the PP has no right of appeal from the order of the High Court dismissing the reinstatement application. Learned counsel contended that when the motion was first considered by the High Court, it was not exercising its appellate or revisionary jurisdiction. The High Court too was not exercising its original jurisdiction under s 22 of the CJA 1964. In the circumstance, learned counsel posited that there is no proper and competent appeal before the court because the appeal has failed to fulfil the requirements of s 51(2) of the CJA 1964 (see *Uthayakumar a/l Ponnusamy v YAB Dato' Sri Najib bin Tun Razak Perdana Menteri Malaysia & Ors* [2017] 1 MLJ 235).

**[7]** We have considered the aforesaid preliminary objection of learned counsel for the respondents. For reasons that follow, we disagree with the submission.

**[8]** Section 50 of the CJA 1964 provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. Section 50 of the CJA 1964 reads as follows:

> 50 Jurisdiction to hear and determine criminal appeals
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> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
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> (a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

(2) An appeal shall lie to the Court of Appeal with the leave of the Court of Appeal, *against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.*

(2A) ...

(3) ...

(4) ...

**[9]** The word 'decision' in s 50(2) is defined in s 3 of the CJA 1964 as follows:

decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

**[10]** In *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129, the application of s 50(2) of the CJA 1964 was explained at p 138 as follows:

So, for the purpose of s 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

**[11]** In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321, the Court of Appeal when deliberating on the meaning of 'decision' in s 3 of the CJA 1964 and the criminal jurisdiction of the Court of Appeal under s 50 of the same Act, held at p 335 that:

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail was not appealable to the Court of Appeal.

**[12]** In our view, that in order to determine whether a decision is final, it is important to bear in mind that not merely the result of the decision be considered but also predominantly its effect. The order of the High Court dismissing the PP's application to relist Appeal Nos 41LB-03–02 of 2015 and 41ORS-01–02 of 2015 which were struck out earlier by another judge was not an interlocutory decision. It must be noted that this was at the appellate stage

after the learned magistrate had acquitted and discharged the respondents. The very nature of the dismissal of the notice of motion possesses element of finality. Upon dismissing the notice of motion, the PP's appeal would become infructuous and the order of acquittal and discharge made by the learned magistrate must therefore be regarded as final. Therefore, the decision dated 19 February 2017 is appealable to the Court of Appeal.

**[13]** Another point to be noted is that an appeal by the PP pursuant to s 50(2) of the CJA 1964 must confine the appeal to questions of law only. The notice of appeal dated 24 February 2017 has formulated the question of law in respect of which this instant appeal is made.

**[14]** For the above reasons, we would dismiss the preliminary objection and the PP's appeal before us is to be proceeded with.

OUR DECISION ON MERITS

*Issue 1: Functus officio*

**[15]** In the case of *Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272; [2009] 3 CLJ 388, the principle of *functus officio* was explained at pp 281–22 (MLJ); pp 396–397 (CLJ) as follows:

> [15] Terdapat beberapa kes yang diputuskan oleh mahkamah-mahkamah di Malaysia berhubung dengan isu 'functus officio'. Bagi tujuan penghakiman ini, rujukan akan dibuat kepada kes *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260; [2007] 9 CLJ 215. Dalam kes tersebut, Hakim Abdul Malik Ishak (sebagaimana beliau ketika itu) telah membincangkan secara panjang lebar isu 'functus officio' dengan membuat rujukan kepada beberapa kes yang diputuskan oleh mahkamah Australia dan Amerika Syarikat. Di ms 223 beliau berkata seperti yang berikut:
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> > *I will now refer to the case of Leung and Another v Minister For Immigration And Multicultural Affairs* [1997] 150 ALR 76, a decision of the Federal Court of Australia with a coram of Beaumont, Heerey and Finkelstein JJ. There, Finkelstein J, had this to say (see p 84 of the report):
> >
> > > The origin of the principle of 'functus officio' as that expression is currently employed is to be found in the latter part of the last century in England when it was decided that a final decision of a court could not be reopened. The reason given was that the power to reopen a dispute had been transferred to the court of appeal: *Re St Nazaire Co* [1879] 12 Ch D 88. The rule applied only after the formal judgement of court had been passed and entered and was subject to two exceptions, vis where there had been a slip in drawing it up and where there had been an error in expressing the intention of the court: *Re Swire* [1885] 30 Ch D 239; *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Ainsworth v Wilding* [1896] 1 Ch 673.

[16] Dalam satu keputusan kes *Mahkamah Agung Kanada, Chandler v Alberta Associations of Architects* [1989] 2 SCR 848, Hakim Sopinka berkata mengenai 'functus officio' seperti yang berikut:

(1) 'Functus Officio'

*Jowitt's Dictionary of English Law* (2nd Ed, 1977) defines functus officio as 'having discharged his duty'; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J in *Re VGM Holdings, Ltd* [1941] 3 All ER 417 (Ch D), is well summarised in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is 'functus officio', and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

*Black's Law Dictionary* (5th Ed, 1979) defines 'functus officio' as 'a task performed':

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc, which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

The doctrine of functus officio states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. And Laundry, Dry Cleaning and Dye House Workers' International Union*, Local No 292 [1964] 44 DIR (2d) 463 (BCSC)) 'To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine' (appellants' factum, at p 19).

Seterusnya pada para 20 (HMA) hakim berkata:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can do so only if authorised by statute or if there has been a slip or error within the exception enunciated in *Paper Machinery Ltd v JO Ross Engineering Corp* [1934] SCR 186.

**[16]** In holding that he had no implied power to alter the previous High Court order dated 8 September 2016, the learned High Court judge stated as follows:

> [12] Can this court now revisit the decision made by a court of co-ordinate jurisdiction on 8 September 2016? A rather similar matter arose in the case of *Public Prosecutor v Chong Kok Choy* [1995] MLJU 549, which concerned the issue of whether a court of concurrent jurisdiction can rectify or vary its order made earlier. The High Court there held as follows:
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> > In *Public Prosecutor v Heng You Nang* [1949] 1 MLJ 285, Spenser Wilkinson, J citing the following passage from the judgment of Petheram CJ in the Indian case of *In re Gibbons* (a decision made at the time when the Indian s 369 was very similar to our s 278) held once a judgment in a criminal matter has been pronounced and signed it cannot be altered. The passage in the Indian case is as follows:
> >
> > > 10. In my opinion the effect of the words 'other than a High Court' is precisely the same as if in place of them the Legislature had at the end of the section added these words 'this section does not apply to the High Court'. There is no substantive enactment in that section with reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before it is unnecessary to consider, but whatever they were, they were reserved and they were in the same position after this section was passed as they had been in before; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore, it appears that this section does not help the applicant.
> >
> > The above passage and the opinion of Spenser-Wilkon, J in *Public Prosecutor v Heng You Nang,* were cited with approval by the then Supreme Court in *Ooi Sim v Public Prosecutor* [1990] 1 MLJ 88 where it held that s 278 does not empower the High Court to substitute its judgment after it was recorded and delivered.
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> [13] The above passage makes it clear that once a High Court has pronounced a judgment it cannot substitute its own judgment. Although the passage concerned the effect of s 278 of the Criminal Procedure Code, the principle is of general application. The phrase 'judgment' would also necessarily include any order made by a High Court.

**[17]** Learned DPP submitted that when the appeals were struck off, the actual issues of the appeal proper were not yet decided upon. Therefore, she spiritedly and vehemently argued that the High Court was not *functus officio* as the order dated 8 September 2016 is not a 'judgment'. The question then arises — what is a 'judgment' in a criminal case? And, can an order striking off an appeal comes within the purview of that term?

**[18]** The word 'judgment' is not defined in the Criminal Procedure Code. The *Halsbury's Laws of England*, Hailsham Ed, Vol IX, paras 260–265 explains it as a final order in a trial terminating in the conviction or acquittal of the accused. In *Chhotey Lal v Tinke Lal And Anr* [1935] AIR 815, the court regarded that an order in the nature of a judgment is one which is passed on full enquiry and after hearing both parties. In *Ayubbhai Abdulbhai Shah vs Gabha Bechar And Ors* (1994) 1 GLR 441, the Gujarat High Court, has held as under:

> The aforesaid discussion from the Supreme Court decision read along with the reference to *Halsbury's Laws of England* makes it quite clear that the order dismissing the matter for default is not a decision on merits. The judgment is nothing if not a decision given by a competent court on merits of a case in respect of a lis between the parties.

(See also *Marzuki bin Mokhtar v Public Prosecutor* [1981] 2 MLJ 155, *Md Alwin Mustapa & Ors v Public Prosecutor* [1999] 5 CLJ 417, *Public Prosecutor v Arab Malaysian Finance Bhd* [2003] 4 MLJ 304; [2003] 4 CLJ 243.)

**[19]** Thus, by using the proper approach of analogy from the decided cases from other jurisdictions, the expression 'judgment' must necessarily mean a considered order on merits and not an order of dismissal for default. Therefore, *functus officio* under s 278 of the Criminal Procedure Code does not arise as the appeals were struck off merely by reason of the non-appearance of the first respondent without consideration of the entire evidence. The High Court is competent to set aside such order by invoking its inherent jurisdiction; and thereafter to relist the appeals and to hear and decide the appeals according to law.

**[20]** With respect, the cases cited by the learned High Court judge are of no assistance as the instant appeal is clearly distinguishable from the former. In *Public Prosecutor v Heng You Nang* [1949] 1 MLJ 285 the PP had appealed against the acquittal of the respondent on charges connected with the alleged importation of certain goods by the respondent. The appeal was dismissed. Subsequently, the DPP applied by motion that the court should hear further arguments and review its judgment. In *Ooi Sim v Public Prosecutor* [1990] 1 MLJ 88 the appellant had pleaded guilty to two charges, for possession of a firearm and ammunition. The trial judge sentenced the appellant to ten years imprisonment and six strokes of whipping on the first charge and another three years on the second charge and ordered that ` both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest. About two and a half months after the disposal of the case, the trial judge issued a corrigenda to substitute the original order with a new one which had the effect of making both sentences to run consecutively, ie the appellant was to serve a total of 13 years imprisonment to take effect from the date of his arrest. The

approach taken by Petheram CJ in *In Re: FW Gibbons vs Unknown* (1887) ILR 14 Cal 42 and Spenser-Wilkinson J in *Heng You Nang* and Mohamed Azmi SCJ in *Ooi Sim Yim* was based on the rational that the cases were already heard on merits after taking into consideration the entire material on record. This differs from our present scenario as the order dated 8 September 2016 could not be regarded as a 'judgment' or final order.

CONCLUSION

**[21]** For the foregoing reasons, we allowed the PP's appeal and set aside the order dated 19 February 2017 and relist the Appeal Nos 41LB-03–02 of 2015 and 41(ORS)-01–02 of 2015. The appeals are to be remitted back to the High Court and be heard on its merits before another High Court judge. Pending disposal of the appeal, a stay of execution against the order of the magistrate's court to return the exhibits to the respondent is also granted pending the disposal of the appeals. So ordered.

*Order accordingly.*

Reported by Dzulqarnain Ab Fatar